PUBLIC FINANCE BHD

v

SCOTCH LEASING SDN BHD; PERWIRA HABIB BANK MALAYSIA (INTERVENER)

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' LAMIN MOHD YUNUS PCA
DATO' PEH SWEE CHIN FCJ
DATUK WIRA WAN YAHYA PAWAN TEH FCJ
[CIVIL APPEAL NO: 02-33-92]
19 APRIL 1996

BANKING & FINANCE: *Leasing – Leasing agreement – Assignment of rights and interests under leasing agreement – Master agreement – Facility agreement – Debentures – Floating charge over book debts – Assignment of book debts*

COMPANY LAW: *Debenture – Whether debenture holder has priority over assignee of book debts under master agreement – Assignment of book debts – Application of s 108 of Companies Act 1965 – Registration*

CONTRACT: *Assignment – Assignment of book debts – Notice of assignment to debtors – Effect of failure to give notice – Rule in Dearle v Hall*

EQUITY & TRUST: *Contract – Trust of book debts – Certainty of words, subject matter, and object*

The respondent ('Scotch Leasing') is a leasing company. To enable it to acquire equipment, chattels, and other movables to be let out to its customers, Scotch Leasing had sought financial assistance from the appellant ('Public Finance'). In return for such financial assistance, Scotch Leasing assigned to Public Finance, *inter alia*, all the payments or instalment payments to be made by its hirers ('book debts). Towards that end, an agreement commonly known as a 'master agreement' or 'facility agreement' was entered into between the two parties on 12 May 1983 ('the master agreement').

On various dates in 1983 and 1984, book debts from 21 leasing agreements were assigned by Scotch Leasing to Public Finance ('the 21 agreements').

The intervener ('Perwira Bank') was the holder of a debenture executed by Scotch Leasing on 11 June 1985, a date posterior to all the 21 agreements. The said debenture was a floating charge over all the undertakings and assets of Scotch Leasing. On 28 October 1986, the said floating charge crystallised when Perwira Bank appointed a receiver and manager for Scotch Leasing.

An originating summons was then filed by Public Finance seeking, *inter alia*, a declaration that upon the true construction of the master agreement, Scotch Leasing was to hold the contract rights and property in respect of the 21 agreements as trustees for Public Finance, and an order that Scotch Leasing be directed to collect all sums due under the 21 agreements and to remit the same to Public Finance. Perwira Bank, however, intervened in the originating summons claiming priority, as a debenture holder, over all the payments in respect of the 21 agreements.

The basic issues that arose for determination were whether Scotch Leasing was to hold the contract rights and property in respect of the 21 agreements as trustees for Public Finance, and whether Perwira Bank had priority over the payments under the 21 agreements. The High Court answered in the negative and dismissed the originating summons. Public Bank appealed.

Held:

Per Peh Swee Chin FCJ (delivering the judgment of the Court):

[1] Subject to statutory intervention and modifications, all kinds of personal property are subject to the *nemo dat quod non habet* rule from which flows the consequence that nobody can claim any personal property against the real owner of that personal property.

[2] The operation of the *nemo dat* rule to certain specific types of personal property has been modified by statutes. However, a 'debt' is not one of them. In other words, there is no known statute which protects a subsequent *bona fide* buyer of a book debt for value without notice of any prior competing interest or right.

[3] Principles of equity in respect of land cannot be applied to personal property at all or without modifications because of the basic inherent differences between land and personal property, *viz*, that personal property is capable of absolute ownership while land is not. The inability of absolute ownership in land makes it possible for a land owner to be subjected to overlapping claims, and this severely modifies the *nemo dat* rule as applicable to land. The same, however, cannot be said of personal property. There is, therefore, no question of priority of claim between Public Finance and Perwira Bank.

[4] When the debenture was executed by Scotch Leasing on 11 June 1985, the undisputed assignments of the 21 agreements had already taken place on various dates in 1983 and 1984. Hence, applying the *nemo dat* rule, the floating charge created by the execution of the debenture could not cover the book debts in respect of the 21 agreements for there was nothing left then in the 21 agreements for the floating charge to cover.

[5] When the floating charge was crystallised on 28 October 1986 upon the appointment of a receiver and manager, the debenture holder did not obtain a fixed charge over the debts in the 21 agreements; for there could be no fixed charge on some of the assets which Scotch Leasing had parted with earlier. Scotch Leasing could not assign, in equity, to Perwira Bank something which Scotch Leasing did not already own or have.

[6] As there was certainty in the creation of a trust of the book debts (certainty of subject matter, ie, the book debts, and certainty of object, ie, Public Finance), there existed a trust of the book debts in favour of Public Finance.

Obiter dicta:

[1] The validity of an equitable assignment (ie, an assignment of a chose in action to a third party without the consent of the other party to the contract) is not affected by any failure to comply with the requirements as laid down in s 4(3) of the Civil Law Act 1956, in particular the failure by the assignee to give notice to the debtor of the assignment – although there is much to be said about the great desirability of giving such notice.

[2] The 'statutoriness' of a subsequent assignment, *ipso facto*, does not prevail over an earlier equitable assignment. This is so even with the added factor that the assignee involved in the statutory assignment took the assignment for value without notice of an earlier equitable assignment.

[3] Section 108 of the Companies Act 1965 was not applicable to a sale or transfer sale, or a transfer of contract rights, debts or property in the equipment in question in respect of the 21 agreements. Hence, the assignment of the contract rights in respect of the 21 agreements to Public Finance was not void for want of registration with the Registrar of Companies.

[Appeal allowed]

*[**Bahasa Malaysia** Translation of Headnotes]*

KEWANGAN & PERBANKAN: *Pajakan – Perjanjian Pajakan – Serahanhak hak dan kepentingan di bawah perjanjian pajakan – Perjanjian induk – Perjanjian kemudahan – Debentur – Gadaian terapung atas hutang-hutang buku – Serahanhak hutang buku*

UNDANG-UNDANG SYARIKAT: *Debentur – Samada pemegang debentur mempunyai keutamaan ke atas pemegang serahhak hutang buku di bawah perjanjian induk – Serahanhak hutang buku – Permohonan s 108 Akta Syarikat 1965 – Pendaftaran*

KONTRAK: *Serahanhak – Serahanhak hutang buku – Notis Serahanhak kepada penghutang – Kesan kegagalan memberikan notis – Kaedah dalam Dearle v Hall*

AMANAH & EKUITI: *Kontrak – Amanah hutang buku – Kepastian perkataan, hal-perkara dan tujuan*

Responden ('Scotch Leasing') adalah sebuah syarikat pajakan. Bagi membolehkan memperolehi peralatan, chatel dan harta alih supaya dapat disewakan kepada pelanggan-pelanggannya, Scotch Leasing telah berusaha untuk mendapatkan bantuan kewangan daripada perayu ('Public Finance'). Sebagai balasan bagi bantuan kewangan yang sedemikian, Scotch Leasing telah menyerahhak kepada Public Finance, antara lainnya, kesemua pembayaran atau ansuran bayaran-bayaran yang harus dilakukan oleh penyewa-penyewanya ('hutang buku'). Bagi mencapai matlamat ini, satu perjanjian yang dikenali sebagai "perjanjian induk" atau "perjanjian kemudahan" telah dimasuki antara kedua-dua pihak pada 12 Mei 1981 ('Perjanjian Induk tersebut').

Pada beberapa tarikh dalam tahun 1983 dan 1984, hutang-hutang buku dari 21 perjanjian pajakan telah diserahhak oleh Scotch Leasing kepada Public Finance (21 perjanjian tersebut).

Pencelah, ('Perwira Bank') merupakan pemegang debentur yang disempurnakan oleh Scotch Leasing pada 11 Jun 1985, sesuatu tarikh selepas kesemua 21 perjanjian tersebut. Debentur tersebut merupakan gadaian terapung atas kesemua akujanji-akujanji dan aset-aset Scotch Leasing. Pada 28 Oktober 1986, gadaian terapung tersebut menjadi matang bilamana Perwira Bank melantik penerima & pengurus bagi Scotch Leasing. Satu saman pemula telah difailkan oleh Public Finance meminta, antara lainnya, satu pengistiharan bahawa di atas pembentukan perjanjian induk tersebut dengan sebenarnya, Scotch Leasing adalah dikehendaki memegang hak-hak kontrak dan hartanah yang berkaitan dengan 21 perjanjian tersebut sebagai pemegang amanah Public Finance, dan satu perintah hendaklah diberikan supaya Scotch Leasing diarah untuk mengutip kesemua jumlah yang kena bayar di bawah 21 perjanjian tersebut dan hendaklah membayarnya pula kepada Public Finance. Perwira Bank, walaubagaimanapun, telah mencelah saman pemula menuntut keutamaan, sebagai pemegang debentur ke atas semua pembayaran berhubung dengan 21 perjanjian tersebut.

Isu-isu asas yang berbangkit untuk penentuan adalah samada Scotch Leasing hendaklah memegang hak-hak kontrak dan hartanah bagi 21 perjanjian tersebut sebagai pemegang amanah Public Finance, dan samada Perwira Bank mempunyai keutamaan ke atas pembayaran-pembayaran di bawah 21 perjanjian tersebut. Mahkamah Tinggi telah tidak membenarkan dan menolak saman pemula tersebut. Public Bank merayu.

Diputuskan:

Oleh Peh Swee Chin HMP (menyampaikan penghakiman Mahkamah):

[1] Tertakluk kepada pencelahan dan ubahsuaian berkanun, kesemua jenis harta persendirian adalah tertakluk kepada kaedah *nemo dat quod non habet* yang mengakibatkan bahawa tidak sesiapa pun boleh menuntut apa-apa harta persendirian itu.

[2] Operasi kaedah *nemo dat* bagi menentukan jenis-jenis harta persendirian yang khusus telah diubahsuai oleh statut. Walaubagaimanapun, sesuatu "hutang" bukan salah satu daripadanya. Dalam ertikata yang lain, tidak terdapat apa-apa statut yang diketahui, yang melindungi seorang pembeli *bona fide* yang berikutan, dari sesuatu hutang buku bagi nilainya tanpa notis bagi apa-apa nilai atau hak berasingan yang terdahulu.

[3] Prinsip ekuiti berkaitan dengan tanah tidak boleh dipakai kepada harta persendirian sama sekali atau tanpa pengubahsuaian disebabkan oleh perbezaan asas yang sedia ada antara tanah dan harta persendirian, iaitu bahawa harta persendirian boleh dijadikan pemilikan mutlak sedangkan tidak pada tanah. Ketidakbolehan pemilikan mutlak dalam tanah membolehkan tuanpunya tanah dijadikan tertakluk kepada tuntutan-tuntutan tertindih dan ini secara kerasnya mengubahsuai kaedah *nemo dat* sepertimana yang terpakai kepada tanah. Perkara yang sama, namun begitu, tidak boleh diperkatakan bagi harta persendirian. Dengan itu, adalah tidak berbangkit persoalan keutamaan tuntutan antara Public Finance dan Perwira Bank.

[4] Ketika debentur telah disempurnakan oleh Scotch Leasing pada 11 Jun 1985, penyerahhakan 21 perjanjian tersebut yang tidak dipertikaikan telah pun berlaku pada beberapa tarikh dalam *dat*, gadaian terapung yang diwujudkan oleh penyempurnaan debentur tersebut tidak boleh melindungi hutang buku berhubung dengan 21 perjanjian tersebut kerana tiada apa lagi yang terdapat dalam 21 perjanjian tersebut untuk dilindungi oleh gadaian terapung itu.

[5] Bilamana gadaian terapung tersebut dibentuk pada 28 Oktober 1986 setelah perlantikan penerima dan pengurus, pemegang debentur tersebut tidak mendapatkan gadaian tetap terhadap hutang-hutang dalam 21 perjanjian tersebut; kerana tidak mungkin terdapat gadaian tetap ke atas sebahagian daripada aset-aset yang telah dilepaskan oleh Scotch Leasing pada awalnya. Scotch Leasing tidak boleh menyerahhak, dalam ekuiti, kepada Perwira Bank sesuatu yang Scotch Leasing tidak lagi miliki atau punyai.

[6] Oleh kerana terdapatnya kepastian dalam pengujudan amanah hutang buku (kepastian hal perkara, iaitu hutang buku dan kepastian objek, iaitu Public Finance), terdapat satu amanah bagi hutang buku tersebut atas nama Public Finance.

Obiter dicta:

[1] Keesahan sesuatu penyerahhakan ekuiti (iaitu, suatu penyerahhakan hak dalam tindakan kepada pihak ketiga tanpa persetujuan pihak yang satu lagi kepada kontrak tersebut) tidak terjejas oleh apa-apa kegagalan untuk mematuhi syarat-syarat yang dibentangkan dalam s 4(3) akta Undang-Undang Sivil 1956, khususnya kegagalan pemegang serahhak untuk memberikan notis kepada penghutang penyerahhakan tersebut - walaupun banyak yang boleh diperkatakan mengenai kebaikan memberikan notis yang sedemikian.

[2] "Statutoriness" (sifat berkanun) penyerahhakan yang berikutan, *ipso facto,* tidak mendahului apa-apa penyerahakan ekuiti yang lebih awal. Ianya sedemikian rupa dengan terdapatnya faktor tambahan bahawa pemegang serahhak tersebut terlibat dalam penyerahhakan berkanun, telah menerima penyerahhakan tersebut bagi nilai tanpa notis penyerahhakan ekuiti yang lebih awal.

[3] Seksyen 108 Akta Syarikat 1965 tidak terpakai kepada sesuatu jualan atau pindahmilik jualan, atau pindahmilik hak kontrak, hutang atau harta dalam peralatan yang dipersoalkan berhubung dengan 21 perjanjian tersebut. Dengan itu, penyerahakkan hak kontrak tersebut berhubung dengan 21 perjanjian kepada Public Finance tidak batal kerana ketiadaan pendaftaran dengan Pendaftar Syarikat.

[Rayuan dibenarkan]

Cases referred to:
Karrupiah Chettiar v Subramaniam, [1971] 2 MLJ 116 ***(refd)***
Brice v Bannister [1878] 3 QB 569 ***(cit)***
Kelly v Selwyn [1905] 2 Ch 117 ***(cit)***
Ward v Duncombe [1893] AC 369 ***(cit)***
Pfeifer v Arbuthnot [1988] 1 WLR 150 ***(cit)***
George Barker v Eynon [1974] 1 WLR 462 ***(cit)***
Dearle v Hall [1828] 3 Russ 2 ***(refd)***

Legislation referred to:
Sale of Goods Act 1957, ss 27, 29
Civil Law Act 1956, s 4(3)
Companies Act 1965, s 108
Bills of Exchange Act 1949
National Land Code 1965

Other sources referred to:
Halsbury's Laws of England, 4th Edn, Vol 16, p 882

For the appellant - L L Tan; M/s Chooi & Co
For the respondent - Mathias Cheng; M/s Skrine & Co
For the intervener - Sabithri; M/s Adam & Co

JUDGMENT

Peh Swee Chin FCJ:

This case is a difficult one and so much confusion has been caused. Basically, there are two claimants to some book debts of the respondent/defendant in the appeal, ie, Scotch Leasing Sdn Bhd which has been engaged in the business of leasing equipment, chattels and other movable property to hirers or hire-purchasers, (the respondent/defendant is hereinafter called the leasing company).

In order to let on hire or hire-purchase to customers such equipment *etc*, the leasing company has in the past obtained financial assistance from the appellant/plaintiff, ie, Public Finance Bhd, to assist in acquiring the said equipment *etc*, so that the same could be so let on hire *etc*. In consideration of such financial assistance, the leasing company assigned to the appellant/plaintiff, *inter alia*, all payments or instalment payments to be made by such hirers or hire-purchasers to the leasing company, (the appellant/plaintiff is hereinafter called the assignee). It has not really been disputed that some book debts owing by various hirers and hire-purchasers to the leasing company were assigned to the assignee on various dates in 1983 and 1984 and there were such 21 leasing agreements in respect of which, such debts or book debts had already been assigned before the present originating summons was first filed in 1990 in the Court below, from the decision of which an appeal has been filed and now has come up for hearing before us. The said originating summons together with the identification numbers of the said 21 leasing agreements and the dates of purchase of which by the assignee is set out below:

Originating Summons

Let the Defendant within 8 days after service of this Summons on him, inclusive of the day of service, caused an appearance to be entered to this Summons, which is issued on the application of the plaintiff, Public Finance Berhad, of 1st-4th Storey South Block, Wisma Selangor Dredging, 142-A Jalan Ampang, 50450 Kuala Lumpur.

By this Summons the Plaintiff seeks the following orders namely:

(a) A declaration that upon the true construction of the Master Agreement dated 12th day of May 1983 (hereinafter referred to as 'the said Master Agreement') made between the Plaintiff, Public Finance Berhad of the one part Defendant, Scotch Leasing Sdn Bhd as 'dealer' of the other part, the Defendant is to hold the contract rights and property in the goods in all of the lease agreements purchased by the Plaintiff pursuant to the said Master Agreement namely,

Lease Agreement No	Date
83/178	9/9/83
83/181	"
83/183	"

83/187	"
83/190	"
84/36	15/2/84
84/77	4/5/84
84/79	"
84/80	"
84/89	"
84/90	"
84/93	"
84/98	18/5/84
84/100	7/6/84
84/104	"
84/105	"
84/115	16/7/84
84/144	"
84/145	"
84/146	"
84/147	"

as trustees for Public Finance Berhad.

(b) For an order that the Defendant be directed to collect all sums under the said lease agreements and to remit the said sums to the Plaintiff.

(c) For an order that the Defendant render a full account of the payments made to the Defendants by the respective lessees.

(d) For an order that the Defendant pays forthwith to the Plaintiff all the proceeds from the sale of the repossessed equipment/vehicles repossessed under the the said lease agreements.

(e) For an order that the Defendant forthwith delivers up all the photocopies of the ledger cards of the respective lessess in its possession.

(f) A declaration that the Plaintiff is legally entitled to the RM37,550.80 in a Fixed Deposit Account No 3302016963 with the Perwira Habib Bank by the Plaintiff as stakeholders pursuant to the said Agreement.

(g) That the costs of and incidental to this application be taxed on a solicitor client basis by a proper officer of the court and paid by the defendant to the Plaintiff.

(h) Further and/or other relief as the Court deems fit to grant.

Dated the 8th day of May 1990.

Signed
Senior Assistant Registrar
High Court, Kuala Lumpur

It is to be borne in mind that the assignment of the debts of the 21 leasing agreements listed in the above originating summons has not been really disputed

except, that very briefly for the present, the contentions of the intervener have been first, that the intervener in the originating summons has a claim to the debts which prevails over the claim of the assignee for some reasons which will be dealt with later and secondly and further that assignments have not been executed in accordance with s 4.01 (a) of a certain "master agreement" in the form "as and when required" of the contract rights and property in the goods held by the leasing company on trust for the assignee "in respect of agreements purchased" by the assignee pursuant to the master agreement, the relevant provision of which will be set out later.

The intervener is Perwira Bank Bhd, the holder of a debenture executed by leasing company for the said intervener but subsequent to the said 21 leasing agreements, and more about this later, (the intervener is hereafter called the debenture holder).

The 21 leasing agreements or the book debts therein were assigned to the assignee by the leasing company in pursuance of the terms of an anterior agreement the type of which people in the same trade as the leasing company has been engaged in and they are wont to call it "the master agreement". which some other people like to call a "facility agreement" or other names. Whatever label is used for such an agreement is immaterial so long as its true legal effect is examined and ascertained. The relevant portions of this master agreement (hereinafter called the master agreement) are set out below:

> An AGREEMENT made this 12th day of May 1983 between **PUBLIC FINANCE BERHAD**, a company incorporated in Malaysia and having its registered office at Tingkat Kelima, Wisma Perdana, Jalan Dungun, Damansara Heights, Kuala Lumpur and having a branch office at Lower Ground & Fourteen Floor, Bangunan Public Bank, No 6, Jalan Sulaiman, Kuala Lumpur (hereinafter called "PFB") on the one part and **SCOTCH LEASING SDN BHD**, a company incorporated in Malaysia and having its registered office at Room 402, 3rd Floor, Hardware House, Nos 398-400, Jalan Tuanku Abdul Rahman, Kuala Lumpur and place of business at Lots 5 & 6 Light Industrial Area, Batu 4½, Jalan Genting Klang, Setapak, Kuala Lumpur (hereinafter called "the Dealer") of the other part.
>
> WHEREBY IT IS AGREED as follows:
>
> **ARTICLE I**
>
> **Section 1.01 Dealer's Request to Purchase**
>
> PFB agreed that it will at the request of the Dealer from time to time consider and if PFB at its absolute discretion thinks fit purchase from the Dealer the rights of the Dealer (hereinafter called "The Contract Rights") under the equipment lease agreements (hereafter called "the Agreements") entered into by the Dealer as owner with the Lessees mentioned therein and the Dealer's property in the goods comprised therein and subject to the terms and conditions herein contained.

Section 2.01 Acceptance and Payment

If PFB at its absolute discretion decides to accept the Dealer's request to purchase all or some of the Agreements comprised in any such request it shall notify the Dealer accordingly and thereupon the contract rights and the property in the goods comprised therein shall vest in PFB and PFB shall pay to the Dealer a sum equal to the total of all outstanding principal sum or the total of all outstanding sum at the sole discretion of PFB due under the agreements purchased (hereinafter called "the collection value") less:

Collection of Instalments

Section 3.01 Collection by the Dealer

(a) To collect punctually as agent for PFB all sums due under the agreements and remit such sums without any deduction to PFB punctually at monthly intervals the first remittance to be one (1) month from the date of the purchase of the agreements by PFB pursuant to Section 3.01 hereof and subsequent remittances to be on each succeeding month of such date or at such other intervals as PFB may require holding the same meanwhile on trust for PFB and if PFB so require paying the same into a bank account to be opened in the name of PFB or as PFB shall direct. Provided that PFB shall be at liberty at any time at their absolute discretion to terminate the Dealer's authority to collect sums from Lessees under the agreements and thereupon the Dealer shall cease to collect or engage in collecting the same;

ARTICLE 111

Duties and obligations of Dealer

Section 4.01 The Dealer hereby covenants and undertakes that it will at its own costs and expenses

(a) As and when required by PFB to execute an assignment or assignments in the form required by PFB of the contract rights and the property in the goods in all or any of the agreements purchased by PFB pursuant to this Agreement and until such assignment or assignments to hold the contract rights and property in the goods and the agreements as trustee for PFB;

(b) to pay to PFB on demand the amount of all legal charges and all stamp duties paid or incurred by PFB on any such assignment or assignments, PFB being at liberty to... itself for such charges and duties out of the retention referred to in Section 2.01 hereof:

(c) to maintain proper accounts on behalf of PFB in the names of the Lessees showing the amount paid by and due from the Lessees both before and after purchase of the agreements by PFB hereunder and to punctually submit to PFB statements pertaining thereto periodically as and when required by PFB and to permit PFB and its agents full facilities to inspect and audit such accounts and take copies thereof and extracts therefrom whenever PFB shall require;

Section 4.04 Power of Attorney

In consideration of the premises the Dealer hereby irrevocably appoints.

PFB for the time being its Attorney for the purpose of executing any assignments required to be executed by the Dealer in favour of PFB under the provisions of this Agreement and for the purpose of executing all other documents necessary to vest title in PFB to any of the agreements or any goods comprised therein and the Dealer further irrecoverably appoints such aforesaid the Attorney of the Dealer for the purpose of accepting and indorsing all bills of exchange, and making and indorsing all promissory notes which the Dealer is obliged to accept, make or indorse pursuant to the provisions of this Agreement.

The debenture holder is the holder of the debenture dated 11 June 1985, a date posterior to all the dates of purchase of the 21 leasing agreements. It has not been disputed either, that (a) a floating charge was created as on 11 June 1985 over all the undertaking and assets of the leasing company, including all the movable and immovable property and (b) that the floating charge was crystallized on 28 October 1986 when the debenture holder appointed a receiver and manager for the leasing company. The debenture holder applied to intervene in the originating summons herein claiming all the payments in respect of those 21 leasing agreements, adversely, of course, against the assignee; *viz* being payments to the leasing company from those hirers or hire-purchasers of those 21 leasing agreements in respect of the said equipment *etc*.

All parties in the Court below agreed before the learned Judge that the question required to be answered by the Court was as to whether under the master agreement, and to quote,

Defendant is to hold the contract rights and property in the goods in all of the lease agreements from 9/9/1983 – 16/7/1984 as trustees for the Public Bank.

The words "Public Bank" a misnomer for its subsidiary, could not possibly refer to any person other than the Public Finance Bhd, the assignee. The lease agreements refer, of course to the 21 leasing agreements and the "defendant", refers to the leasing company.

In the event that has turned out, the learned Judge in the Court below, giving a field day to the intervener, held that the trust in favour of the assignee did not exist in respect of the 21 leasing agreements in pursuance of the terms of the master agreement on various grounds which would be dealt with later together with the grounds of decision of this Court. The assignee has thus appealed to us.

It is obvious that the competing claims are between the claim of the assignee of the one part and that of the debenture holder, and the receiver and manager of the leasing company of the other part, and not forgetting that, in this connection, the leasing company has been placed under the said receiver and

manager, the leasing company would have to listen to his master's voice at all times, *viz*, that of the debenture holder through the said receiver and manager who has, by virtue also of the terms of the debenture, become the agent of the leasing company.

In our opinion, the grounds on which such competing claims ought to be resolved are based on three principles, which however, specifically, are confined to debts or book debts, being the subject matter of the claims. The first principle is *nemo dat quod non habet*, ie, a person cannot give what he does not have, (hereinafter called the *nemo dat* rule), the second principle is that in the case an assignment of book debt, it is most desirable, (but not essential to the validity of the assignment as between the assignor and the assignee, ie, the vendor and the vendee of a book debt), that notice of the assignment should be preferably given to the debtor, otherwise the debtor, not knowing about the assignment, can validly pay the debt in question to the assignor or any other person as may be directed by the assignor, even in fraud of the assignee and the third principle, if we may call it as such, is that those rules in equity which normally apply to land transactions such as those which apply to legal estates and equitable interests of land in England should not be applied to personal property, (as opposed to immovable or real property) either at all, or without a great deal of modifications, and it is to be remembered that a debt or a book debt is a kind of personal property. We will state below our explanation on a number of matters somewhat discursively which may, at first sight, appear to be disjointed but all of which, it is hoped, will add up to a sufficient explanation as stated.

The first confusion of all the parties in the appeal, we observe, is about the identity of the debtors involved in the present appeal. The debenture holder, has through its learned counsel, argued on the implied basis, that the debtor was the leasing company. Now, the leasing company may be a debtor in a normal sense to the debenture holder for money borrowed by the leasing company; but the leasing company is not the debtor of the debts, the subject matter of the assignment, for the purpose of giving notice to in respect of specifically, the assignment of debts of the 21 leasing agreements, please see the second principle above-mentioned. Thus the debtors in respect of the assignment of those 21 leasing agreements are the hirers and hire-purchasers who have never been parties to the originating summons and neither has there been any evidence as to whether any party involved herein has given notice to such hirers and hire-purchasers. This appeal therefore has to be dealt with without regard to the debtors in these 21 leasing agreements.

Personal property, otherwise known as personalty or movable property is different from real property otherwise known as immovable property or land in one important aspect for the purpose of the *nemo dat* rule, more about this later. Personal property includes such diverse things as money, goods, stocks and shares, cattle and choses in action.

All choses in action are categorised under personal property, examples of choses in action being stock and shares, debts (as stated above), life insurance policies, bills of lading, patents and copyrights, *etc*.

Subject to statutory intervention and modifications, all kinds of personal property are subject to the *nemo dat* rule from which flows the consequence that nobody can claim any personal property against the real owner of that personal property. We are of the opinion that the operation of *nemo dat* rule to certain specific types of personal property has been modified by statutes, and a "debt" is NOT one of them, more about this, later.

Speaking of statutory modifications, in the case of sale of goods, the *nemo dat* principle is modified by various sections in the Sale of Goods Act 1957, such as ss 27, 29 *etc* therein, in which a *bona fide* buyer for value without notice, eg, of the lack of title of the seller is protected in certain situations.

We may just as well mention here that choses in action are expressly excepted from the definition of the word "goods" in the Sale of Goods Act 1957, this is to be borne in mind when speaking of choses in action in connection with the *nemo dat* rule.

A number of choses in action (categorised under personal property), themselves have also been modified by various statutes, such as stock and shares (by Companies Act 1965), negotiable instruments (by Bill of Exchange Act 1949), also by the relevant legislation in the cases of life insurance policies, copyrights, etc, respectively. For illustration, in the case of negotiable instruments, such as bills of exchange, property in them passes by mere delivery. Please see the sections therein.

We might just as well mention here also that no known statute has modified debts or books effectively to interfere with the application of the *nemo dat* rule to them, in other words, for example, there is no known statute which protects a subsequent *bona fide* buyer of a book debt for value without notice.

Principles of equity as regards land cannot be applied to personal property at all, or without modifications because of the basic inherent difference between land and personal property. It is, that personal property is capable of absolute ownership while land (real property) is not.

If a person buys a cow and pays for it, normally he is the absolute owner, notwithstanding another person may claim it against the said buyer as a subsequent *bona fide* buyer for value without notice pursuant to some special provisions of the Sale of Goods Act 1957. That claimant claims, not on the ground that he has "an equitable interest" in the cow but because he is a *bona fide* buyer for value within the ambit of certain sections of the Sale of Goods Act 1957. To say such claimant has an equitable interest in the cow is not quite correct, though in theory in law, there can be equitable interest in

the personal property so long as people are fond of using the device of trust for their personal property *etc*. Trusts are the principal creation of Court of Chancery.

Still on the question of absolute ownership, at common law, land is not capable of such absolute ownership because land in England is owned by the Crown, ie, the Queen as a body politic, this concept is perpetuated in Malaysia, eg, in Perak, all land is vested in the State Authority, ie, the Ruler of Perak as a body politic, and to the State Authority, all registered proprietors of land pay quit rents.

Continuing to speak of the difference of land in England from personal property on the point of absolute ownership, at common law, all "owners" of land are tenants of the Crown, holding the same under various tenures, eg, such as for life, in tail and in fee simple, the last-named being the highest type of tenure. These tenures are called "estates". Nobody can claim therefore that he is the absolute owner of any land, thus the owners of these estates enjoy legal rights in the land in question and all other interests in land which are short of estates in land just explained. Such other interests in land are often called equitable interests in land. Equitable interests in land started off first as rights *in personam* against another person, historically.

We believe that, *inter alia*, such inability of absolute ownership of land therefore makes it possible for a land owner to be subjected to overlapping claims and this severely modifies the *nemo dat* rule in land, except, in execution cases, where, eg, a judgment creditor enforces and executes a judgment obtained against the land of a judgment debtor, (who is the registered owner of the land) and has to fight against the owner of an equitable interest in the land, such as a prior purchaser of the judgment creditor's land where the purchaser has not got the land registered yet in his own name. The *nemo dat* rule was held to apply by the clearest implication, though not in so many words, against the judgment creditor in the Federal Court's case of *Karrupiah Chettiar v Subramaniam*, [1971] 2 MLJ 116, in which the execution creditor's prohibitory order against the land registered in the name of judgment debtor, was set aside on the ground that the judgment debtor had, prior to the execution proceeding, already sold the land to the purchaser who had applied to set aside the prohibitory order. The Federal Court held, in setting aside the prohibitory order, that the judgment debtor had parted with his interest in the land and there was therefore nothing that could be put up for sale. Therefore it has been seen that *nemo dat* principle does not apply conclusively in resolving conflicting claims to land save in execution cases, but the same cannot be said of personal property.

The true nature of an assignment of a debt or book debt is such that such a debt, (not being modified by any statute as regards the applicability of the *nemo dat* rule), can only be transferred by way of assignment, and not by delivery

in the case of sale of goods, or in the case of land by executing a valid and registrable transfer according to the provisions of the National Land Code. Assignment is the instrumentality of transfer or sale of a debt.

At common law, (in the special sense now of its being distinguished from rules in equity), contractual rights, eg, as to debts were not assignable, ie, transferable to another person without the consent of both parties to the contract conferring such contractual rights. Equity stepped in and has long allowed such assignment of such debts to another person who is not privy to the contract in respect of such debts, without at all the consent of the debtor, see eg, *Brice v Bannister* [1878] 3 QB 569 and even without notice to the debtor, see *Kelly v Selwyn* [1905] 2 Ch 117, and *Ward v Duncombe* [1893] AC 369. Such assignments as so allowed by equity are called equitable assignments.

The validity of such equitable assignments is not affected by any failure to comply with requirements as laid down in s 4(3) of the Civil Law Act 1956 for an assignment that so complies has been described as a statutory assignment; being so statutory for such an assignment has the sole intended effect of facilitating an assignee to sue in his own name directly irrespective of whether the chose in action is an equitable chose in action or a legal chose in action, (not, be it noted, whether an assignment is equitable or statutory). By being a statutory assignment itself, the "statutoriness" of such an assignment, *ipso facto*, does not prevail over an earlier equitable assignment, and this is so even with the added factor that the assignee involved in a statutory assignment took the assignment for value without notice of an earlier equitable assignment, eg see *Pfeifer v Arbuthnot* [1988] 1 WLR 150.

We need to say a few words more about the great desirability of giving notice of assignment of a debt, by an assignee to the debtor, even though absence of such notice does not affect the validity of the equitable assignment as between the assignor and the assignee. If notice is not given, the assignee must give credit for any payment made to the assignor by the debtor. This rule means that, by extension, that even if the assignor assigns once more the debt to another person in fraud or otherwise on the earlier assignee, and that another person gives notice to the debtor; and if the debtor pays that the person or the second assignee, then the earlier assignee must still give credit to the debtor for his payment thus, for the debtor cannot be blamed for doing lawfully in ignorance of the title of the earlier assignee who has failed to give notice of the assignment to the debtor. Notice to debtor is for the protection of the assignee himself. It is this effect of what the debtor does lawfully as described that dims the view of the true role of the *nemo dat* rule in the resolution of disputed claims to a same debt. The money paid to the "second assignee" can of course be recovered by the earlier assignee on the *nemo dat* principle.

In the light of what has been stated above, and with further explanation where appropriate, we now approach the task of deciding both the questions posed by learned counsel of both parties by consent in the Court below, and the adverse claims of the assignee and the debenture holder respectively.

When the debenture was executed by the leasing company on 11 June 1985, the undisputed assignments of the 21 leasing agreements had taken place on various dates in 1983 and 1984, so that applying the *nemo dat* rule, the floating charge created by the execution of the debenture could not cover the book debts in respect of the 21 leasing agreements for there was nothing left then in regard to the 21 agreements for the floating charge to cover.

Likewise, when the floating charge was crystallised on 28 October 1986 on the appointment of a receiver and manager, the debenture holder did not obtain a fixed charge over the same debts in these 21 leasing agreements; for there could be no fixed charge on some assets which the leasing company had parted to somebody else earlier, ie, the assignee. What, in effect, legally and in theory, the debenture holder could have obtained, by a crystallisation of the floating charge over the book debts in respect of the said 21 leasing agreements, would have been an equitable assignment from the leasing company, ie, of the debts paid by the hirers or hire-purchasers, if the said 21 leasing agreements had not been already assigned in 1983 and 1984 to the assignee, see *George Barker v Eynon* [1974] 1 WLR 462. The leasing company could not assign in equity to the debenture holder something which the leasing company did not already own or have and the *nemo dat* rule applied.

On the basis of notice of assignment to the debtors, the real competing claims (in regard to the debts paid by those hirers or hire-purchasers), of the debenture holder and the assignee respectively for so-called priority has not even begun to arise in this particular appeal, because there is no evidence before us as to whether the assignee has or has not given notice to the debtors, ie, those hirers or hire-purchasers; or as to whether the debenture holder has done so or not similarly; please see the non-liability of the debtors to pay twice the same debt due to absence of notice of the original assignment in circumstances explained above.

Before this Court makes the necessary order, it would be necessary now to comment directly on the other grounds of the learned Judge in the Court below and arguments of the learned counsel for the debenture holder and the receiver and manager; such grounds and arguments have prompted this Court in the first place to give such a long explanation before such commenting.

The learned Judge held that the trust mentioned in the originating summons in favour of the assignee in respect of payments of those hirers and hire-purchasers did not exist, despite learned counsel for the assignee's submission on the existence of the three certainties of trust.

Of the three certainties of trust, first there is the certainty of words of creation of a trust; thus in "section 3.01" of the master agreement, it is expressly provided that the sums paid (by the hirers and the hire-purchasers under the agreements, (21 lease agreements), are to be held "on trust" for the assignee and to be dealt with in the ways mentioned therein. Again under s 4.01, it is also provided expressly that the contract rights and property in the goods in respect of the agreements are to be held by the leasing company as "trustee" for the assignee. It is quite impossible to be left in doubt about the certainty of the words in the creation of the trust, in the face of the very words quoted.

There is the certainty of the subject matter about the contract rights and property in the goods and the payments (from the hirers and hire-purchasers).

There is finally the certainty of object, ie, the fact of the assignee being the receipient of the payments and beneficial owner of the contract rights and property in the goods in question has been clearly and expressly stated.

The learned Judge in the Court below appears to rest his decision of the non-existence of the trust solely on a question of priorities, ie, as to which of the two would be entitled to priority, the assignee or the debenture holder. The lower Court ought to have considered the existence of the three certainties. On the question of the priorities, it will be presently looked into, of course in the light of the rather long explanation earlier.

The question of priorities, (borrowed rather inappropriately for the purpose of this case, from the rules of equity in regard to competing claims of two or more holders of equitable interests in land), may only arise between the assignee and the debenture holder herein, on the further question of assignee and the debtors of the assignment of the 21 leasing agreements; in the way explained above. We have described who the debtors are, ie, those hirers or hire-purchasers who signed the 21 leasing agreements with the leasing company. We have referred to this briefly earlier. The question of priorities which was discussed by the learned Judge has still not arisen in the instant appeal.

Guided by the *nemo dat* rule, once a notice of assignment from the assignee in respect of the debts of those hirers and hire-purchasers, in turn in respect of those 21 leasing agreements, has reached or reaches (as the case may be) any of those debtors, ie, the said hirers and hire-purchasers, the entitlement of the assignee to the debts in question would be incontestable against the assignee by anybody else including a subsequent so-called *bona fide* buyer for value without notice of the purchase of the debts. Such entitlement would be incontestable against the assignee on the it-goes-without-saying basis that the 21 leasing agreements and their purchase or assignment are genuine or are not a device for defrauding anybody else. Such genuineness however has never been disputed and what has been disputed has been largely whether the trust in question has existed and also whether as between the assignee

and the intervener, whose claim should have priority. As stated earlier, the trust exists and that the *nemo dat* rule applies in favour of the assignee.

We deal next with the contention of learned counsel that the master agreement has not been registered with the Registrar of Companies under s 108 of the Companies Act 1965 and therefore the debenture holder took the 21 leasing agreements *bona fide* for value without notice of the right of the assignee, presumably the debenture holder had checked up with the registry of the Registrar of Companies before the execution of the debenture. This is a worn-out argument against the assignee whose title in the debts as explained above cannot be possibly affected by such "*bona fide* buyer for value without notice" and the intervener has claimed to be such a *bona fide* buyer. We do not think we could now stretch learned counsel's argument to mean that the assignment of the 21 leasing agreements is void for lack of registration under the said s 108 for it was not so argued, also consequently the other side was not invited to argue on this stretched point. We do not think that such assignment of book debts, ie, sale and purchase of book debts is required to be so registered. Section 108, in any event, refers expressly to the registration of charges or other agreements on the assets of a company, which we believe, are all executed to secure or as security for the benefit of creditors, the repayment of money lent by such creditors to such company, either out of some fund or money of a borrower-company, or out of the proceeds of realisation of some other assets of the company. This must be the normally desired consequence of the charges referred to in the section requiring registration under it; we are, however on the other hand, dealing with the outright sale or transfer sale or transfer of contract rights or debts or property in the equipment *etc* in question in respect of those 21 leasing agreements, involving no repayment of the purchase price of those 21 leasing agreements to the assignee by the leasing company in the instant appeal.

Arising out of the above paragraph, we also would like to say a few words about s 4.10 (a) of the master agreement set out above earlier. A careful reading of the same would clearly indicate that in the case of agreements, with hirers and hire-purchasers of equipment already purchased, the "contract rights and property in the goods" and the purchased "agreements" would be expressly held in trust by the leasing company for the assignee, and subject to this pre-existing trust, the leasing company would be liable, "as and when required" by the assignee "to execute such assignment or assignments", "in the form required" by the assignee. This means, that at the instance of the assignee, the leasing company is liable to sign such further documents of the assignment of those leasing agreements already purchased in respect of rights already created and covered by the pre-existing trust in the form desired by the assignee. This would be supererogatory or superfluous in so far as such assignment is already valid without any further documents. The wording of s 4.01 (a) of the master's is therefore clumsy and misleading. The motive for the reservation by the assignee of such right to have such desired form "as

and when required" is a matter of speculation. By way of illustration, one speculation may be to make such further documents more elaborate for the hirers and hire-purchasers in question when the assignee decides to terminate the right of the leasing company to collect money from them in future and instead, to collect from them directly, ie, these further elaborate documents instead of mere brief notices of assignments to the hirers and hire-purchasers. The right to collect from the hirers and hire-purchasers, granted to the leasing company, could be for the reason of the assignee being able thereby to avoid engaging additional staff, incurring more expenses and to allow the assignee to concentrate on its core business. In this connection, the fact is that the assignment of the 21 leasing agreements was not challenged before us, and, the evidence in support of this fact, it was further pointed out to this Court, in any event, came from paras 5 and 6 of the affidavit of the manager of the assignee (company) dealing with details with the trust created in respect of money payable *etc* under these 21 leasing agreement as such paras 5 and 6 were not denied by the receiver and manager in his affidavit in reply, in which such paras 5 and 6 were not dealt with while other paragraphs of the affidavit of the assignee's manager were expressly referred to and replied by the said receiver and manager.

The learned Judge in his grounds has apparently accepted further the submission of the learned counsel for the debenture holder in the Court below substantially, if not wholly. His Lordship, in particular, relied on certain passages cited to him from a book on "factoring" law written by a certain accountant who does not possess any law degree or legal qualification. We would not rely on them. We would have to decide the issues ourselves without regard to such passages.

The learned Judge next relied on the passage from page 882 of Vol 16, of the *Halsbury's* 4th Edn as cited by learned counsel for the said receiver and manager in the Court below. The passage is set out below:

> Where the legal estate is outstanding, the priority of equitable interests is *prima facie* governed by the rule *qui prior est tempore, potior est jure* (he who is first has the strongest right). The rule will be excluded if there is an act or omission by the prior equitable owner of such a character as to justify his true being postponed and, in certain cases, if he fails to effect registration in respect of his interest. The rule follows from the principle that equitable interests depend on the creation of a trust. The creation of a trust vests an interest in the subject matter of the trust in the beneficiary, and this interest cannot be postponed to a subsequent interest except upon grounds which justify the interference with it as a vested interest.

The passage starts with the sentence, "Where the legal estate is outstanding..."; In the first place, legal estate refers to legal estate of land and not of personal property. We have explained what is a legal estate earlier. The word "estate" cannot but apply to land. Quoting the passage applicable to land as if it were

a reference to personal property, eg cattle, is not appropriate in the light of the explanation above about *nemo dat* rule; and about the impossibility of absolute ownership of land in England and Malaysia in law.

The learned Judge apparently accepted the ratio of *Dearle v Hall* [1828] 3 Russ 2, cited by the same learned counsel in the Court below, presumably as the basis for the importation of rules of priority in conflict of claims from holders of equitable interests in land into personal property. We now presently look into it with this suggested basis in mind.

Briefly, in that case, one Brown was entitled, during his life, to about £93 annually arising from a share in the residue of his father's estate, such residue comprised some investments. Being in need of money, Brown, in consideration of receipt of a sum of money, granted to Dearle £37 a year out of the £93 aforesaid. By way of collateral security, Brown had assigned all his interest to Dearle in the sum of £93 pa. Both Dearle and Brown did not give notice of this assignment to the executors of the estate of Brown's father. This was in 1808.

We pause here to observe at once, that the debtor in this assignment was the estate, ie, the estate's executors who, unlike, in our instant appeal, were trustees as well as debtors of that assignment there. Confusion could have possibly affected learned counsel who cited this case below by a mistaken belief that following this case, notice of assignment in the instant appeal must be given to the leasing company, described as trustee in the master agreement.

In 1812, Brown publicly advertised for the sale of the same interest, ie, the annuity of the £93 aforesaid and the same was assigned to Hall by Brown. Hall gave notice of the assignment to the executors of the estate and consequently, the first payment by the executors of Brown's estate was made to Hall, who however, subsequently found out about the earlier assignment to Dearle. Dearle took action in Court, and the Master of the Rolls in the Court below there opined, that Dearle, having failed to give notice of assignment to the executors of the Brown's father's estate had enabled Brown to commit the fraud on Hall, and Dearle could not rely **on the priority in point of time**, [Emphasis is ours].

On appeal, the House of Lords, while upholding the decree of the Master of the Rolls, but for different reasons, (through Lord Lyndhurst LC) gave judgment basing it instead, on the general principle that notice of assignment of a debt should have been given to the debtor, (ie, the estate of the deceased father of Brown), "in order to take away from the debtor the right of making payment to the assignor," and not on the rule of priority in point of time frequently employed by Courts in dealing with conflict of claims of holders of equitable interests in land. We would venture to say that by fairly clear implication that the *nemo dat* rule was applied subject to the rule of notice of assignment to debtor for an assignee's own protection. We wonder, why Lord Lyndhurst did

not observe that the learned Master of the Rolls there had wrongly treated (a) a chose in action, ie, the right of some residuary legatee to a deceased person's estate, ie, the said Brown, as if it was an equitable interest in land and (b) the said Dearle & Hall as competing for such equitable interests in land. It will be remembered that the learned Master of the Rolls there had applied the rule, *qui prior est tempore potior est jure*, normally meant for cases of convicting claims to land by holders of equitable interests in it.

Before dealing further with other contentions, we would like to make certain observations about the expression, "equitable interests". In relation to land, we have explained above its meaning. In personal property, such equitable interests can, in theory, of course, exist and are tenable, but we venture to suggest that in relation to personal property, the expression should be used more as a method of description for convenience to describe any right just falling short of that legal right accorded to the owner of personal property. Great caution is required when attempting to employ principles in equity about equitable interests in land to personal property for reasons given above.

The Court therefore finds for long reasons above-mentioned the trust in terms as prayed in the originating summons.

This Court therefore allows the appeal of the appellant by setting aside the order appealed from and making an order in terms of the originating summons herein. The intervener, is to pay costs here and below but that there be no order as to costs at all in regard to the respondent (defendant). Further the deposit in Court is to be refunded to the appellant.

Reported by Isaac TJ Lee

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